No. 1808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

IN ADMIRALTY.

ANDREW ANDERSON, A. ANDERSON COMPANY (a corporation), JOHN J. BEATON, ANGUS BEATON, EDWARD CARLSEN, HARRY F. CHASE, MALCOLM P. CHASE, L. CHASE, SAMUEL B. CHASE, MARY L. CHASE, WM. B. CHASE, JR., DOROTHY M. CHASE, FRED J. CHASE, GEORGE BOOLE (a corporation), MRS. E. G. BOOLE, HENRIETTA W. HOBBS, E. W. HOBBS, CLARENCE W. HOBBS, EDWARD HENRIX, MARGARET J. WALL, MARION B. WALDRON and HENRY NELSON, Libelants,

Appellants,

vs.

J. J. MOORE & COMPANY (a corporation), Respondent,

Appellee.

BRIEF FOR APPELLEE.

WILLIAM DENMAN,
Proctor for Appellee.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLEE.

Statement of Facts.

The extraordinary congestion of shipping in the port of San Francisco, in the months of January, February and March of the year 1908, has brought before the courts in not less than five cases, the centuries old dispute between shipper and vessel owner, as to the responsibility for delay in reaching the place at which the ship owner is to make his delivery.

San Francisco's reputation for such congestions has not been bad, but evidently both parties had such a contingency in mind, as the contract expressly provides that the charterer shall not be liable for "hindrances beyond his control." It is not less significant that we find in the charter party at bar none of those short phrases upon which ship owners customarily rely to place the burden of procuring a ready berth on the consignee.

The constant repetition of such phrases in the maritime decisions shows their use is well established in the shipping world. No question could have been raised as to the absolute responsibility of the charterer either to find a berth or become liable for demurrage if the owner had inserted in his charter party a phrase to the effect that the lay days commence "24 hours after her entry at the custom house" *(Carbon Slate Company v. Ennis,* 114 Fed. 260; *Demster Steamship Line v. Earn Line S. S. Co.,* 168 Fed. 50); or that the

"vessel shall be loaded promptly" *(Harding v. 4908 Tons of Coal,* 147 Fed. 971); or that the lay days shall begin "24 hours after arrival in port" *(Smith v. Lee,* 66 Fed. 344); or, lay days "to commence 24 hours "after her inward cargo or her unnecessary ballast is "finally discharged" *(1600 tons of Nitrate v. McLeod,* 61 Fed. 849 at 851); or, that she shall have "quick dispatch" *(Davis v. Wallace,* 3 Clifford 123; *Mott v. Frost,* 47 Fed. 82); or "customary dispatch" *(Lindsay, Gracie & Co. v. Cusimano,* 12 Fed. 503); or, that the lay days shall begin when "the ship is ready, whether in berth or not" *(W. K. Niver Coal Co. v. Cheronea S. S. Co.,* 142 Fed. 402); or, that they shall begin when the vessel reaches a certain "dock or as "near thereto as she can safely get" *(Nelson v. Dahl,* 12 Chancery Div. 562).

The appellee here was a coal importer, selling coal in San Francisco, the general coal market for central California, Nevada and Arizona. The coal carried on the "Columbia" was sold to the Western Fuel Company, under a contract made the 24th day of November, 1906, that is *over a year before* the congestion in San Francisco (page 78). The "Columbia" was chartered by the appellee on June 26th, 1907, or *six months* before the congestion (page 20). Her voyage was clear across the Pacific and the date of her arrival could not have been foretold within a month's period.

It further appears that it is necessary, and the practice, in supplying the territory tributary to the San Francisco market to order Australian coal at least a

year ahead of time, and that all the coal shown to have been brought in by the appellee was brought in under agreements made about a year previous (page 84).*

It is uncontradicted testimony, as we read the record, that all the coal that caused the congestion in January, February, and March, had been ordered somewhere about a year before, in response to a demand which had existed for two or three years prior to that time and which had caused a coal famine in the winter of 1906 and 1907.**

J. J. Moore, 59.

F. C. Mills, 84.

The delay to the shipping did not commence until after the first of January, as it appears that the steamer "Jethou", which arrived on November 15th, finished the discharge of her 5830 tons of coal on November 30th, or at the rate of over 500 tons per day and within the contract requirements (pages 131, 129), counting out holidays and rainy days as lay days. The same is true of the steamer "Riverdale", which arrived on December 20th (page 66) and completed her discharge of 5898 tons of coal on January 3rd, also well within her lay days (page 131). J. J. Moore, who had sold for delivery at the different bunkers of the port, states (page 52) that the congestion had

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*We do not find in our opponent's summary this important and seemingly undisputed fact.

**Nor do we find this fact in our opponent's summary.

been continuing several weeks prior to the receipt of notification of the "Columbia's" readiness, sometime after January 18th, and this testimony, coupled with the fact that these other colliers in November and December were discharged within their lay days, would indicate that about January 1st was the beginning of the congestion.*

Nor is it denied that the congestion which filled all the bunkers and coal stowage places in the port (page 52) was caused by the unforeseen financial depression

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*Our opponent states ingeniously at page 6, that the evidence shows that **"within four months prior to March 1st,"** that is subsequent to November 1st, respondent brought over 45,000 tons of coal to San Francisco. The record shows, however, the arrivals were but 26,838 tons, as follows:

Arriving.	Vessel.	Place of Discharge.	Tons
Nov. 9	"Craighall"	Oakland	5630
Nov. 15	"Jethou"	Not at Western Fuel Docks	5830
Dec. 20	"Riverdale"	Not at Western Fuel Docks	5898
Jan. 10	"Camphill"	Western Fuel	5500
Jan. 14	"Columbia"	Western Fuel	2220
Jan. 21	"Lunsmann"	Oakland	1760
	Total		26838

It thus appears that the respondent brought but one cargo, of 5500 tons, into the port in three weeks before the "Columbia's" arrival and but 5898 tons in the month prior to that. As the "Columbia's" lay days did not commence to run, even under the theory of our opponent, until February 7th, the fact that all but the 5500 tons on the "Camphill" had arrived seven weeks before gives a very different impression from a statement that the 45,000 arrived during the period ending March 1st. No cargo brought by respondent, other than the little "Lunsmann" which discharged after the "Columbia", arrived after January 10th. None but the "Camphill's" and the 300 tons of the "Lunsmann" was discharged at the Western Fuel Company's bunkers.

With a population of 750,000 around the Bay of San Francisco, consuming in winter at least a ton a month per family of say ten persons, not less than 75,000 tons would be consumed each month without considering the country demand at all. The amounts above tabulated seem insignificant in comparison with the manifest consumption.

of 1907, which, in closing down eastern manufacturing industries threw into the western market an extraordinary supply of coals.

All the coals brought in by respondent were sold before arrival and hence it was beyond its power to remove them from the bunkers and stowage places in which its vendees had placed them (Mainland, page 66, Moore, page 57). As they were brought in and sold to meet an established demand, and as the national financial depression was entirely unforeseen and in no way attributable to the respondent company, it is apparent that the congestion of the port, causing the delay in discharging the "Columbia" was a *"hindrance beyond the charterer's control"*.

It further appears that not only was the general congestion due to causes beyond the charterer's control, but the congestion at the Western Fuel docks was in no reasonable sense attributable to cargoes which the Western Fuel Company, as vendee of J. J. Moore & Company, may have failed to have taken from their bunkers. No cargo from any vessel chartered by J. J. Moore & Company had discharged at the Western Fuel docks for two months prior to the arrival of the "Columbia".

These bunkers were on three parallel wharves, on the ends of Mission, Howard and Folsom streets, the three streets next adjoining Market street to the south. The three bunkers were operated under one management, hence affording the vessel three times

the chance of furnishing a free dock that she would have if each were operated separately and required a separate designation.

The capacity of the three bunkers is very large; at Mission street they could discharge the "Camphill's" 5500 tons in six days, or about 900 tons a day (page 89). The other two both discharged steamers (pages 90, 91) and must have had at least a capacity of 500 tons per day (page 96). This made a total discharging capacity of 1900 tons a day. It is apparent that the sale of the "Camphill" cargo to the owner of these bunkers would have in no way interfered with the "Columbia's" discharge in any normal condition of the port. As a matter of fact, during the entire depression from January 1st to March 20th, when the "Columbia" was discharged, the record shows J. J. Moore & Company to have brought in but this one other cargo, which had been ordered a year before (page 85). The testimony shows, however, that a great number of cargoes had been brought in by other persons. (Mills, pages 88 to 94).

The only cargo discharged from such a vessel after the arrival and before the discharge of the "Columbia", was from the steamer "Camphill", which arrived *5 days before the "Columbia"*, and a small parcel of 300 tons to lighten the schooner "Lunsmann", so she could enter Oakland creek (133, 61, 62). The "Lunsmann" arrived after the "Columbia", but as the 300 tons was taken from her on a holiday, Washington's birthday, and as holidays were excepted from the

discharging days of the "Columbia", by the terms of the charter party, the latter was not affected by the courtesy to the "Lunsmann". The "Camphill" did not commence discharging till February 6th, the last of the "Columbia's" claimed discharging days, and she consumed but seven of the many days during which the "Columbia" awaited her turn for other vessels to finish discharging.

The testimony is also undisputed that it is the custom of the port, as well as the practice of the Western Fuel Company's bunkers, to discharge steam colliers before sailing vessels, each within its class in turn, in the order of its arrival. The attempt of our opponent's brief to make it appear that this evidence was not evidence of a *general custom* in this port, but merely applied to the Western Fuel Company's bunkers, is not borne out by an inspection of the record.

Smith, pages 95, 96;
Mills, pages 82, 83;
Mainland, 63.

Mr. Smith's testimony (pages 95 and 96) is as follows:

"Q. How long have you been in the coal business yourself?
A. Twenty-six years.
Q. In this port?
A. Yes, sir.
Q. Are you familiar with the custom of the port with regard to the discharge of coal in the port?
A. Yes, sir.
Q. Supposing there are several vessels waiting for discharge at the docks at San Francisco. What is the order in which they would be discharged?
A. Usually at the date of arrival. They will take their turn.
Q. Is there any distinction as between steam and sail?

A. Yes, sir. Steamer have the preference.

Q. What is the reason for that?

A. Well, the cost of maintenance of steamers is a large amount, and they have to keep their crews and force aboard at all times. Sailing vessels can usually get along with one or two men. The expense of maintaining a sailer is very small in comparison with a steamer.

Q. Is there any difference in the rate of discharge between sailers and steamers which also is a part of the foundation of the custom?

A. Yes, sir; the discharge of steamers usually runs from 500 to 1,000 tons a day, and a sailer 100 to 200 tons a day.

Q. Now, as I understand it, the custom of the port is that steamers are discharged before sailing vessels?

A. Always.

Q. And within their respective classes, vessels are discharged in the order of their arrival?

A. Yes, sir, usually.

Q. Is that the custom?

A. That is the custom; yes.

Q. Are you familiar with the custom of other ports?

A. Only at the loading ports of our mines in British Columbia. We load there aboard the vessels.

Mr. HUTTON. I don't think anything in British Columbia is material in this case, or the loading is material. We are dealing with the discharging.

The COURT. Let it go in, and get through with it. It is quicker that way.

Mr. DENMAN. Q. What is the custom at these ports?

A. The same as at San Francisco. A sailer is pulled out, and the steamer put in ahead, and let her wait until the steamer is finished."

The captain of the "Columbia" admitted that the customary place for the discharge of coals was at bunkers and that the Western Fuel Company's bunkers were such customary bunkers (H. Larsen, page 31).

The only serious conflict in the evidence was as to whether J. J. Moore & Company had designated the place at which the vessel was to discharge. Mr. Nelson, the manager of the "Columbia", claimed that he had received no designation, but J. J. Moore testified that he had designated the bunkers of the Western Fuel Com-

pany (page 51). Mr. Moore's testimony is corroborated by Mr. Smith of the Western Fuel Company, who says that the manager of the "Columbia" made frequent enquiries of him, after her arrival, as to when he would be able to get his ship discharged (page 97), thus showing that he knew he was going to the Western Fuel Company's bunkers, and contradicting his testimony (Nelson, page 37) that he did not know the discharging place until March 16th, 1908. Manager Nelson's testimony is further contradicted by his admission that in observing the weather, to compute his lay days, he went down *every day to the bunkers of the Western Fuel Company* to see whether the rains interfered with their working there (Nelson, pages 73, 69).

Mr. Moore states that he had this conversation with Mr. Nelson about two days after the arrival of the vessel, that is to say, on the 16th of January, 1908, the vessel having arrived on January 14th (page 27). Notice of the arrival was served at noon on the 15th (page 27), thus making the designation of the dock on the first day after the service of notice of arrival. Mr. Nelson admits two conversations with Mr. Moore, one of them a long one, between January 15th and 18th.

On this testimony, all of which was *viva voce* before Judge De Haven, the court found that the charterer had, within reasonable time after the notice of arrival, properly designated the place at which the vessel should discharge. Under the rule now well established, Judge

De Haven's finding, based on such conflicting evidence, will not be disturbed.

La Bourgoyne, 144 Fed. 781, at 783;
Coastwise Transportation Co. v. Baltimore Steam Packet Co., 148 Fed. 837 (C. C. A.).

To summarize the facts, it appears that they are as follows: That J. J. Moore & Company made a contract for the sale of the Australian cargo in question over a year before its arrival and chartered appellant's vessel to bring it here over six months before its arrival; That she arrived on January 14th, 1908, when there was a coal congestion in the port and all the coal bunkers of the harbor were several weeks behind in handling their cargo; That the congestion was due to the presence of coal ordered to satisfy a market which had been established for several years, but which had been suddenly lost by the unforeseen effects of a great national depression; That neither J. J. Moore & Company nor its vendee, the Western Fuel Company, had any control over the undisputed cause of the glut, i. e., the unexpected financial depression; and That J. J. Moore & Company could not have removed it from the bunkers, as it owned none of the coals, they having been sold before arrival; That on January 15th the ship served a written notice of arrival; That on January 16th J. J. Moore & Company directed her discharge at the bunkers of the Western Fuel Company and on January 18th she mailed a notice of alleged readiness to discharge, which notice was received, but the date of

its receipt not proved, probably, when we consider the delay of registered mail (page 35), and that Sunday, a holiday, intervened, not before the 20th; That the vessel was prevented from discharging by the crowded bunkers and stowage places, and the presence of vessels which, under the custom of the port, had precedence over her; That she reached her discharging berth on March 16th, 1908, and completed her discharge on March 20th, 1908.

It is apparent that the owner of the vessel and the owner of the cargo were both seriously damaged by the delay—the owner of the vessel lost the use of his ship and the cost of keeping a watchman on board her—the owner of the cargo lost the interest on his investment, in addition to the embarrassment to his business.

The question presented by this appeal is, whether the charter party throws on the shoulders of the charterer not only his own loss but that of the ship owner as well. It is our contention that, under the contract between these two, the losses should rest where they fall, and that each should shoulder the burden of his own injury and no more. Surely there is nothing essentially inequitable in such an agreement, and it becomes a mere question of interpretation whether its terms accomplish that result.

I.

The Two Issues and the Two Burdens of Proof.

There are two issues in this case. The first is, has there been a breach of the contract to take the cargo from the vessel within fifteen days after she was ready to discharge, and notice of readiness served on the respondent? The libelants claim that she was ready to discharge and that notice of her readiness was mailed, by registered mail, on January 18th, and that her lay days expired on or about February 7th, and that we failed to take the cargo from her until March 20th. It is our contention that the libelant has failed to maintain its burden of proof as to her readiness when the registered letter was delivered, probably on January 20th, and that she was not ready to discharge until she reached her berth on March 16, 1908.

The second issue is an affirmative defense. It is that, granted the vessel was ready to discharge January 20, 1908, nevertheless, the charterer is excused under a separate clause of the charterer as the delay was due "to a hindrance beyond his control".

There are many authorities treating of each of these two issues, cases which we believe have been confused in our opponent's brief. We shall consider the two issues separately in Sections II and III of this brief and classify the cases under the proper heading, trusting we may be able to clarify what might be to our disadvantage to have confused. In Section IV we take up seriatim the points of our opponent's brief.

II.

The Lay Days Did not Begin to Run Until March 16th, When the "Columbia" Was Ready to Discharge at the Berth Directed by the Consignee.

The question under the first issue is, when did the "lay" or loading days of the vessel begin to run, and the pertinent clause is:

"To be discharged as customary, in such customary "berth as consignees shall direct, ship being always "afloat, and at the average rate of not less than 150 "tons per weather working day (Sundays and holidays "excepted), to commence when the ship is ready to "discharge, and notice thereof has been given by the "Captain in writing; If detained over and above the "said laying days, demurrage to be at 3d. per register "ton per day."

The condition precedent to the running of the lay days is that the vessel shall be "ready to discharge", which discharge is to be "in such customary berth as the consignees shall direct". It is our contention that it is the law both of America and England that under such a clause a vessel is not ready to discharge until she is in a position to deliver her cargo to the consignee in the berth designated to her.

As a matter of common sense analysis, the receipt of the cargo on the dock, which is, after all, the sole purpose of a contract of carriage, is just as impossible when the vessel is lying in the stream a quarter of a mile off, as when she is at sea with her voyage but half

completed. After the designation of the dock there is still much to be done by the vessel herself in which the consignee can take no part at all, before the "discharge" with its mutual co-operation of consignee and the vessel can take place. The vessel is not ready to discharge, that is ready in the sense of having done all the things she has to do by herself, till she is in her berth.

It is in this latter sense that the courts have interpreted the phrase "ready to discharge" in charters carrying coal and other bulky cargoes, which under modern conditions are required to be unloaded by special machinery and appliance at bunkers and other suitable structures.

The law is summarized in the very able opinion of Judge Putnam, speaking for the Circuit Court of Appeals, as follows:

> "According to the primitive rule, a charterer who agrees to furnish a cargo for a vessel and to discharge it is bound to have the cargo ready when the vessel is ready, and to receive the cargo immediately on its arrival at its port of destination. This primitive rule applies to all contracts concerning the handling of merchandise, alike of sale, transportation, or bailment of any kind; but, within the last century, *in view, partly, of the necessities of coal ports, and of ports for shipment and receipt or ores and grain, and the modern facilities peculiarly provided at terminals for handling the immense masses of such merchandise now required to* be handled, this rule has somewhat yielded, as is fully explained in Scrutton's Charter Parties and Bills of Lading (5th Ed., 1904), 17 to 22. This has gone so far that this author says in effect, at pages

259, 260, 261, that a mere obligation to load or unload imports a stipulation that the work shall be done according to the settled and established practice of the port. Mr. Scrutton says, in effect, at page 260, that it has needed a long series of decisions to accomplish this proposition. The same series of decisions has also established the further proposition that aside from any peculiar custom, the consignee has a right, to a certain extent to select a particular wharf or berth for discharge of the vessel, although that berth or wharf may be occupied when the vessel is ready to unload, for that reason delaying her; and this not only under charter parties like those now before us containing the words 'as ordered', but also where neither these words nor an equivalent expression are found. This is not only the settled law in England, but it is the apparent law in the United States.

"Accordingly, alike with regard to the port of loading and the port of discharge, large margins are given charterers which have resulted in long detentions of vessels, extremely burdensome, but for which compensation has been refused."

* * * * * *

"Apparently, therefore, the law is as claimed by the W. K. Niver Coal Company, that the former customary words in charters, namely, 'ready to unload or discharge', 'and written notice given', have no effect except from the time the vessel reaches the precise berth where she is ordered by the consignee to discharge, subject, of course, to exceptions where some special fault rests on him."

W. K. Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 402 at 406 and 408.

Certiorari refused, 26 Supreme Ct. Rep. 761.

That the period of delay under the rule as laid down by Judge Putnam may cover a number of weeks, is apparent from the fact that in one of the cases relied

upon by him the vessel was detained after the time she should have been loaded more than *fifteen* days and in another over *thirty-five* days.

142 Id., 406, 407.

The delay, after the lay days, in the case at bar was *thirty-seven* days, accepting libelants' view of the case and admitting their claim that their notice of readiness was mailed as registered matter on January 18th, and presuming it was delivered on the 20th, the 19th being Sunday, and admitting the truth of Manager Nelson's statement that there were but six and one-half holidays and rainy days between this and February 11th, when the fifteen lay days must have expired.*

Judge Putnam further reviews the authorities on which he bases his summary of the law, but we do not feel it necessary to burden this brief with a duplication of his work, further than to answer, as we shall do later, certain criticisms of our opponents.

The above language of Judge Putnam's is quoted with approval by Judge Hale, and a delay of fourteen days would have been excused under the rule there laid down, had there not been a violation of a charter provision (not contained in this case) that the vessel should be loaded "in her turn promptly".

Harding v. Cargo of Coal, 147 Fed. 970.

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* The above seems to answer the suggestion on page 5 of opponent's brief that it would be "a vain task to search the law books for any case which holds justifiable" such a delay as in the case at bar. Other cases, both English and American, treating of delays practically as long, are later considered.

In the case of *Dantzler Lumber Company v. Churchill,* the Circuit Court of Appeals, through Pardee, says as follows:

> "The charter-party provides, 'It is agreed that the lay days for loading shall be as follows: Commencing from the time the Captain reports his vessel *ready to receive or discharge cargo* * * *'. The Master testifies that she was ready to receive cargo on the 16th and that he gave verbal notice to the Dantzler Company * * * on the 17th * * *.
>
> "As the evidence fails to show that the 'Hornet' was at her wharf in Gulf Port before the 18th and as the general rule is that the *notice of the ship's readiness to receive cargo can be properly given only after* the ship is ready *and at her proper place for loading* (see MacLachlan, 411), we take it that the only sufficient notice given in this case is the written notice given December 18."
>
> *Dantzler Lumber Co. v. Churchill,* 136 Fed. 560, 561.

In the case of *Flood v. Crowell,* the charter provided that the vessel should be discharged at the rate of 250 tons per day and that the lay days should commence "from the time the Captain reports himself ready to "receive or discharge cargo". The Captain reported on arrival when the vessel was herself ready to discharge, but before she had reached her berth. The libel was for five days' demurrage. Judge Pardee, speaking for the Circuit Court of Appeals, comments on the absence of any provision for "despatch" or "quick despatch", and goes on to say:

> "The ordinances regulating the assignment of ships to wharves in the port of Galveston for load-

ing and unloading, *and the custom prevailing in the port of Galveston, requiring, when the wharves are all occupied, that ships shall be assigned in their turn,* were, or should have been, known to the owners of the ship, who, it appears, had sent previous cargoes, under charter parties similar to the present one, to the port of Galveston; and they did know, or should have known, that all the wharves in Galveston were public, and could not be controlled by consignees. Being charged with this knowledge, if the owners desired to make consignees liable for delays of the kind, they could and should have provided for the same in their contract. Having failed to make such provision, and the consignees not being bound, under our construction of the charter party, to immediately furnish the ship a wharf at which she could discharge without delay, we cannot find that for the delay in this case the consignees were in any wise in default."

Flood v. Crowell (C. C. A.), 92 Fed. 402 at 405.

In *Earn Line Steamship Co. v. Ennis,* 157 Fed. 941, the court states the question as follows (page 942):

> "The libelant claims that the 'Dania' arrived at Santiago on June 11, 1903, was ready to load and in free practique at 11:30 a. m., and that the lay days commenced at 12 o'clock noon of that day, whereas the *respondent insists that the vessel did not arrive at the loading berth* on June 11, 1903, until 12:10 o'clock p. m., and that the lay days did not commence until June 12th at 12 o'clock."

and then gives its conclusion as follows (page 943):

> "There was no evidence submitted in this case, on the part of the respondent, but that taken by the libelant establishes to my satisfaction (1) that *the steamship 'Dania' was not ready to load at Santiago until after 12 o'clock of noon of June 11, 1903,* and as a result, under the charter party, lay days did not commence to run until 12 o'clock noon of

> June 12th, the following day, and the retention by the respondent of the sum of 72.04 as dispatch money for the time saved in loading was properly deducted."

The decision of the District Court was affirmed by the Circuit Court of Appeals in *Earn Line S. S. Co. v. Ennis,* C. C. A. 165 Fed. 635.

In *U. S. v. J. J. Moore,* where the general subject of the duties of the ship were under discussion, the Supreme Court said:

> "The wharf, under the contract, was the place of destination, and the appellant took the chances, as observed by the court of claims, of obstacles which should intervene to delay the delivery of the coal at the wharf, as they did of other obstacles which might have intervened to prevent the coal reaching the harbor."
>
> *U. S. v. J. J. Moore,* 196 U. S. 157.

Hutchinson, in his work on the American Law of Carriers, lays down the rule as follows:

> "Sec. 848. Lay days at the port of loading do not begin to run against the charterer until the Master gives notice to the charterer that his vessel is ready to receive cargo. Such a notice can properly be given only after the ship is ready and *at her proper place for loading.*"
>
> *Hutchinson on Carriers,* Vol. II, page 939.

> "Sec. 850. When the charter party provides that the cargo is to be delivered at any safe berth 'as ordered' on arrival in the dock, the words 'as ordered' would have no meaning *unless they gave the charterer an option to settle the end of the voyage.* In such case the option is in the choice of a berth, and the carrying voyage ends, not on the arrival of

the vessel in the dock, but on her arrival at a berth as ordered. If a strike occurs among the dock laborers after the order has been given to go to a certain berth, the charterers will not be liable for a delay occasioned by their refusal for some time to order the vessel to another berth not affected by the strike. *Nor will they be liable for a delay occasioned by the ship being unable to proceed to the designated berth owing to the crowded condition of the dock.*"

Hutchinson on Carriers, Vol. II, page 941.

This brings us to the case of *Percy v. The Union Sulphur Co.,* 173 Fed. 534, decided in the District Court by Judge Hale. Judge Hale, as we have shown, approves the rule laid down by Judge Putnam in the W. K. Niver Coal case as to the interpretation of the words "ready to discharge", and as he makes no distinction here, it is apparent that he had not changed that opinion. The decision is manifestly based on a subsequent agreement between the parties as to when the lay days began to run. In the case at bar there is no such agreement, but, on the contrary, the correspondence shows that there was a disagreement. The significant thing about each of Mr. Moore's letters is that it claims the benefit of the custom of the port in the computation of the demurrage days. In his letter of February 10th, Mr. Moore says:

"Under the most favorable circumstances, in consideration of the Charter Party, they will not expire before the night of Thursday, the 13th inst., and we further beg to advise you that the matter will be handled **as customary,** when the time arrives. * * * However, be this as it may, the vessel will be **discharged in her turn,** as customary."

Apostles, 128.

"They are not as yet up, nor will they be for some days to come. When the vessel is discharged her **demurrage** will be treated in the **usual and customary way.**"
Apostles, 125.

The most that can be said for Mr. Moore's letters is that they recognize that the ship was claiming an early expiration of her lay days and that he was answering that even under the most favorable interpretation of the charter party the ship had underestimated the number of lay days, and that in any event he would not be liable for prevention of delivery due to delays arising from the custom.

Judge Hale's decision does not consider any such clause, as is in the charter party at bar, exempting the charterer from delays from "hindrances beyond his control". It is apparent that even if the parties agreed when the lay days had terminated, this would not make the charterer liable if the delays thereafter were due to such hindrances. This clause receives a full treatment in our next section.

The Percy case is further distinguishable from the case at bar, as the charter there considered did not give the charterer an express option to choose the discharging berth, and did not provide who was to dock the ship. In the charter party at bar the charterer has the right to "*direct*" the ship to a dock. The duty to dock is hence in the ship (Apostles, page 21), and the *ship* must pay for one shift of the vessel even after discharging has commenced (Apostles, page 23).

The English authorities show the law in England to be the same as in America. It is unnecessary to at-

tempt a review of the history of the law which finally crystallized in *Tharsis Sulphur & Copper Co. Ltd. v. Morel* (1891), 2 Q. B. D. 647; VII Aspinall, 106; and *Murphy v. Coffin,* 12 Q. B. D. 87; V Aspinall 531.

In the Tharsis case the charter gave the charterer the option of selecting a berth at the vessel's destination. On her arrival all the berths were occupied, just as in the case at bar (testimony of J. J. Moore, page 52). She was delayed for some time and her owners sued for the demurrage. It was held that the lay days did not begin to run till she was in her berth, ready to discharge. Lord Esher, Master of the Rolls, says:

> "Now this contract does not name any particular berth; it says 'any safe berth as ordered', which must have meant 'any safe berth as ordered by the charterers'. Does that give them the right of fixing the place where the carrying voyage is to end? Even if the case stood alone I should say that the right was given to the charterers; but the case of *Tapscott v. Balfour* (ubi sup.) has dealt with this form of words, and the court there held that in such a case as this the charterer has power to fix what is to be the end of the carrying voyage, and the consequence of his doing so is the same when he has given his orders as though the place had been named in the charter-party. That case was decided nearly twenty years ago, and being a decision on the meaning of a mercantile contract in a form frequently used by merchants, we ought at this distance of time to follow it, unless fully convinced that it was wrong. But, apart from that, I think, as a matter of reason, that the case was well decided, and no effect would be given to the words 'as ordered' unless it is held that the order, when given by the charterer, settled where the voyage is to end as much as though the place were named in

> the charter-party. When, therefore, the option in this case of naming the berth was exercised the effect was the same as though the berth had been named in the charter-party."
>
> *Tharsis Co. v. Morel,* VII Asp. 107, 1891, 2 Q. B. D. 647.

Bowen, L. J., and Fry, D. J., agree with Lord Esher in separate opinions. The remarks of the former to the effect that "The most that can be said is that the "charterer does not exercise his option unless he "names a berth that is either free or soon likely to be" are manifestly but summary of the two cases of *Ogden v. Graham* and *Samuel v. Assurance Company,* which were claimed to be favorable to the ship owner. The term "berth that is free or soon likely to be" cannot refer to the facts in the case Bowen was deciding. The berth designated in that case was neither free nor soon likely to be, as the congestion lasted for some days, and yet he held that under the charter, the charterer could designate such a dock and the discharging time would not begin to run till the other vessels had vacated it and the vessel in question had moored there.

The pertinent portion of *Murphy v. Coffin* is cited by Judge De Haven in his opinion. We have nothing to add to this save that the Court of Appeal has, in its latest case on the subject, reviewed all the cases, and reaffirmed the doctrine laid down in *Murphy v. Coffin* and the Tharsis case. In this latest decision Judge Buckley describes the Tharsis case as a "salient and principal authority", and Judge Kennedy says that it

settled the law on the cases where the option of fixing the discharging place is given the charterer. Lord Alverstone agrees with both judges.

Leonis S. S. Co. v. Rank (No. 1), XIII Com. Cases 136 at 143 and 151 (1908).

In the latter case the vessel was obliged to wait her turn from February 22 to April 5th before she was loaded, that is to say for *forty-four* days. The Court of Appeals holds that as the charter did not contain any provision giving the consignee the right to choose a berth, the lay days began as soon as the vessel arrived at the port and the rule in the Tharsis case did not apply. They are all agreed, however, that it would have applied and the charterer would not have been liable for *any of the forty-four days' time* if (as in the case at bar) he had had the option of choosing a dock expressly given him in the charter. It is well to note that in the Leonis case *No. 2*, a second appeal in the same litigation, the Court of Appeals did excuse the charterers from all liability on the ground that the delay was a "hindrance beyond the charterer's control". This decision we treat later under our second issue, merely calling the court's attention to the fact that there are these two late English cases, in both of which the reasoning supports our contention, and one of which decides our exact question.

It will surprise many members of our Federal bench to learn that *Scrutton's Charter Parties* is a compilation biased by the employment of one of its authors. Very likely our opponents have the knowledge of condi-

tions at the English bar to warrant the attack on so distinguished an author, and yet, somehow, even the English courts seem to treat the work as worthy of consideration. We therefore venture to offer Mr. Scrutton's summary of the law.

> "The commencement and mode of calculation of the lay days will depend on the custom of each particular port."
>
> *Scrutton, Charter-parties,* page 98.

> "If the charterer will not name a wharf or dock, where none is named in the charter, and there is more than one in the port, he will be liable for any damages occasioned by the delay, *but he is not bound to name one that can be reached immediately.*"
>
> *Scrutton, Charter-parties,* page 99.

Applying the above rule of both the American and English courts to the contract made by the parties at bar, it appears that the libelants have not established their condition precedent to recovery, i. e., that the "Columbia" was ready in her berth and notice of her readiness served more than 15 weather working days before her cargo was discharged. On the contrary, it appears that she was not ready in her berth till March 16th and that respondents discharged her within her lay days thereafter.

III.

The Delay in Obtaining a Berth Was A Hindrance Beyond the Charterer's Control, for the Consequences of Which It Is not Liable.

The second issue in this case arises under the following provisions of the charter party:

"* * * Frost, Flood, Fire, Strikes or Accidents at "the Colliery, or on Railways, or any *other* hindrance "of *what nature soever* beyond the Charterer's or "their agents' control, throughout this charter, always "excepted" (page 22).

We claim that under this clause we are not liable, even if the lay days began on the delivery of the letter dated Jan. 18th notifying us of the vessel's alleged readiness, as her delay in reaching her bunkers was due to a hindrance beyond the charterer's control, i. e., congested bunkers and a large number of steamers which had a prior right to discharge.

In our statement of fact, we have pointed out that *all* the Australian coal causing the congestion which extended from January to March, 1908, was imported under contracts made a year prior to that time. That when the orders were placed there was a demand which had been in existence for over two years, and that the amount ordered was not in excess of that demand. It appears, however, that in the fall of that year, that is months after the coal was ordered, and after the charter here in question was made, an unforeseen financial depression of national dimensions destroyed the eastern

market for Rocky Mountain coals and threw them into the territory supplied from San Francisco, causing a glut in that port.

It further appears that all of J. J. Moore & Co.'s coal was sold before arrival, and hence that it had no power, after delivery, to remove its importations from any bunker or stowage place his consignee might leave them in. It further appears that it had brought but one ship load in during the whole month of December before the glut began, and but two ship loads in the previous November, a not extraordinary amount in winter in a market serving over a million and a half of people whose consumption at the rate of a ton a month for say every *twenty* persons would amount to 75,000 a month or 300,000 tons over the four months in question. It further appears that none of these were discharged at the Western Fuel bunkers.

During the entire congestion, up to the time of the "Columbia's" discharge, that is till March 20th, a period of two months and twenty days, the record shows but *one other vessel of respondent to have discharged at San Francisco.* That was the "Camphill", a steamer arriving before the "Columbia" and thus having a preference under the custom of the port, both as a steamer and for priority of arrival.

We have already cited authorities, showing it to be the law of this country that coal and grain cargoes are to be discharged at bunkers and elevators where there are suitable appliances for handling these commodities in bulk. The captain of the "Columbia" admitted at

the trial that the Western Fuel bunkers were such a "customary place".

The Western Fuel bunkers were so capacious that they could *conveniently discharge three steamers at one time.* It is thus apparent that under all normal conditions of the port the fact that the cargo of the "Camphill" was sold to the Western Fuel Company and that she would have to occupy one of these three places for vessels would have had no effect on the discharge of the "Columbia" within her lay days. As a matter of fact she did not *begin* to discharge until the very last of the "Columbia's" discharging days as computed by libelants and then occupied one of the three places but seven of the thirty-seven days the "Columbia" was in demurrage according to their theory.

It further appears that at the time Mr. Moore directed the "Columbia" to the Western Fuel bunkers **all the coal discharging bunkers in the port** were several weeks behind in handling their vessels (J. J. Moore, page 52).

At the trial it was suggested that Mr. Moore was not a competent witness, as he relied on the statements of others in determining that the bunkers were several weeks behind. But how in the name of common sense would he know they were behind save by such enquiry? All his eyes could tell him on an inspection of the water front would be that there were vessels discharging there. What the date of arrival of any vessel was, what other vessels lying in the stream antedated or post dated in arrival those at the bunkers, what cargoes they had, and what lay days their charters provided—all these are

things that the merchant must learn from his associates in the trade. With his twenty-five years' experience and his large stake in the business, he was in a position to give an expert opinion on the discharging conditions of the water front at that time.

However, it is apparent that the depression had caused a universal congestion of coals in the port, and, entirely aside from the testimony of Mr. Moore, this could reasonably be inferred from other evidence.

The "Columbia's" discharge was prevented by the presence at the bunkers of steamers which had the preference both by the custom of the port and the practice of the bunkers and by the time occupied in removing coal from the bunkers to make room for other cargoes (Mills, 94). Some of the vessels, other than the "Camphill", which held back the "Columbia" under this custom of the port were the "Bankfield", "Cecil", "Riverforth", "Gymeric", "M. F. Plant", "Hornelen", "Yeddo", "Turgenskygold", "Finn", "Indra" and "Solatio". None of these were chartered by J. J. Moore & Company. We thus see that but one of the twelve steamers having preference belonged to respondent.

The House of Lords has recently held, in construing a charter party identical with that at bar, that a delay caused by vessels waiting their turn under the custom of the port was a "hindrance beyond the charterer's control" and that he was not liable for its consequences.

> "The Lord Chancellor (Lord Loreburn). I think that this judgment ought to be affirmed. The

> question arises upon a charter-party, the relevant words of which have been referred to fully. In my opinion, the hindrance which delayed the shipping in this case was a block of steamers waiting their turn. I think that it was only the block which caused the hindrance. It was argued that this hindrance was not beyond the control of the charterers *because they had certain other ships which took turn before the vessel in question,* and so delayed her. I think that the best answer to that contention is that the facts do not establish that those vessels were responsible for the delay in question."
>
> *Larsen v. Sylvester,* XIII Com. Cases, 328.

Lord Ashburn and Lord Robertson wrote concurring opinions and there was no dissent. These opinions also dispose of our opponent's contention that the words "other hindrance of what nature soever" are narrowed to include only those matters which are *ejusdem generis* with the exceptions previously enumerated. They hold the common sense view that this means just what it says, "*all other* hindrances", not only of the same nature, but "of what nature soever".

The English Court of Appeal followed this rule in *Leonis v. Rank No. 2,* where the delay lasted *forty-four* days and held that as it was caused by vessels waiting their turn under the custom of the port, it was an "obstruction in the dock" beyond the charterer's control for which he was not liable.

> *Leonis S. S. Co. v. Rank No. 2,* XIII Com. Cases 295, affirming Judge Bingham, Id. 161.

The same rule was laid down by the Circuit Court of Appeals for the Second Circuit, where the law is stated as follows:

"The vessel was delayed *two weeks* by the arbitrary action of the Pennsylvania Railroad, which instead of giving her proper dispatch, postponed her admission to a berth until after other vessels, which came later, but which happened to belong to shippers whom the railroad favored, had been admitted and loaded. The cause of this delay in loading was evidently 'beyond the control of the charterers' in the ordinary use of that phrase, and we are not persuaded to the conclusion that it means anything else because it is included in the same sentence with 'strikes or any other accidents". She was deprived of her turn because a third person, who controlled the situation, refused to let her have it, and such deprivation was the proximate cause of the delay."

Pyman S. S. Co. v. Mexican Cent. Ry. Co., 169 Fed. 281, 283, reversing Id. 164 Fed. 441.

In that case, as in the case at bar, the other bunkers of the port were occupied. The delay amounted to two weeks. If the charterer is excused where the delay is due to the caprice of a dock owner, then *a fortiori* must it be excused when it is due to a glut arising from a great financial depression, for which none of the parties are in any way responsible and which could not have been foreseen.

The case at bar is clearly distinguishable from *W. K. Niver Coal Co. v. Cheronea Steamship Co.,* 142 Fed. 402, where the charterer had *five* steamers "voluntarily bunched" in the port of Boston in November, 1902, at the same time (page 411) *which were all chartered in October or November, i. e., within two months prior, for voyages from Cardiff, Wales* (page 403). Ths is very different from having one vessel in twelve causing the

delay of the "Columbia", whose arrival after her long sailing voyage across the Pacific could not possibly be determined within a month's period, and where the cargo carried by both was ordered a year before.

The same is true of *Schwaner v. Kerr,* recently decided in this court. In that case the charterer had *nine other* vessels in port, with a total grain capacity of 46,500 tons, which in themselves required "more "grain than the usual deliveries by rail would bring "to the dock". It was held by the lower court, 170 Fed. 92, that a delay from this cause was not "beyond the charterer's control" and hence he was not excused. The case is clear authority, however, for the proposition that the mere presence of other vessels brought in by the charterer does not make the hindrance one for which he is liable. The true test is, has he brought in vessels in excess of the conditions reasonably to be expected in the port. In the case at bar it is not contested that J. J. Moore & Company and all the importers had made their arrangements a year ahead for a demand then several years in existence and which they had no reason to believe would be discontinued.

Schwaner v. Kerr, 170 Fed. 92.

On the appeal the point was pressed that the delay was due to the failure of the road to bring to the port a special kind of wheat intended for the particular vessel. The court, in an excellent opinion by Judge Morrow, says:

> "If the respondents had the ample cargo of wheat of particular quality with which to load the 'Tiberious' within the time specified, as they say

they did, they should have notified the railroad company to carry and deliver the particular quality of wheat that was to constitute that cargo from such places and at such times as would enable them to load the vessel within the time limited in the charter party. Had they given such a notice and had the railway company then failed to transport such wheat to the place of loading, a different question could have been presented. But the respondents failed and neglected to give such notice, and this neglect is sufficient in our opinion to deprive the respondents of any extension of the period for lay or working days on account of a delay or hindrance in the movements of cars claimed to have been beyond his control."

Kerr v. Schwaner, C. C. A. 9 Cir., 1747, Feb. 7, 1910.

In the case at bar, it is not questioned that J. J. Moore made repeated requests of the Western Fuel Company to hasten the "Columbia's" discharge (99-100)—nor is it questioned that she was discharged in her turn, according to the custom of the port and the rules of the Western Fuel Company's dock.

In concluding this branch of the case, we cannot but comment on the continual insistence of our opponent on the length of time the "Columbia" was delayed. We believe that we have shown that on her own theory she was in demurrage less than thirty-eight days, but three days more than those for which charterer was held excusable by the English Court of Appeal in *Leonis v. Rank No. 2,* and by our Circuit Court of Appeals in the cases relied on in *Niver Coal Co. v. Cheronea S. S. Co.*

In *The Toronto,* 174 Fed. 632, the delay was caused by a longshoremen's strike which lasted 42 days. The vessel came in at the end of the strike and was affected but five days, for which the charter exception excused the owner. It is apparent from the opinion that the Circuit Court of Appeals would have decided the same way even if she had been delayed during the entire strike.

If the principle be correct, i. e., that we are not liable for delay from causes beyond our control, then it matters not whether the delay be for an hour or a year, so long as we are not responsible for it. It is submitted that the court cannot hold the respondent liable in this case without overruling both the Circuit Court of Appeals of the Second Circuit and the House of Lords, but also violating the principle controlling both the Niver Coal case and *Schwaner v. Kerr.*

As we have before pointed out, such a delay damages the charterer who cannot make delivery and hence collect from his vendee, as well as the owner who cannot use his vessel. There is nothing inequitable in leaving the loss where it falls—on the shoulders of each.

IV.

Summary of Answers to Our Opponent's Arguments.

We now consider seriatim the points made by our opponent's brief.

A. *The vessel was an "arrived ship" when she reached the port* (page 9 appellant's brief). This is undoubtedly true for the purpose of giving the consignee notice of arrival so he can select a dock for her. It is not true for the purpose of giving notice that she is ready *to discharge cargo,* as is shown by the many authorities both of the Federal Circuit Court of Appeals, the English Court of Appeals and the Queen's and King's Bench, cited under Section II supra, to the effect that a vessel is not ready to discharge till she is in her berth. It should be noted that there is no such phrase in the charter as "arrived ship", and we are concerned solely with the phrase "ready to discharge".

B. *The designation was insufficient* (page 29 appellant's brief). Judge De Haven's finding is sustained by the evidence. The bunkers were under one management and the "Columbia" reached the first of the three available spaces in them in her turn. No more definite designation than the Western Fuel bunkers could have been given, and it was to the ship's advantage that there was room for more than one vessel.

C. *The designation must be of a berth which will be vacant in a reasonable time* (page 32 appellant's brief).

None of the Circuit Court of Appeals cases makes such a distinction, and it is apparent that there is nothing in principle to warrant. If the condition precedent is "readiness in berth to discharge" then that is the contract, whether the vessel waits a long or short time. As we have shown in Sec. II supra, the Circuit Court of Appeals, in laying down the rule in *W. K. Niver Coal Co. v. Cheronea S. S. Co.,* 142 Fed. 406, 407, contemplated delays of 35 days and 15 days; and in the Toronto, 174 Fed. 632, 42 days. The English Court of Appeal in *Leonis S. S. Co. v. Rank* (1908), its latest case on the subject, lays down the rule with reference to a case where the delay was 44 days.

We have already shown that Lord Bowen's language in *Tharsis Co. v. Morel* is simply a summary of other decisions and that he held the delay excusable in the case before him when the berth was neither ready nor likely to be for several days.

The words quoted from *Carlton S. S. Co. v. Castle,* 8 Asp. 325, 326, concern a charter party in which there was no clause, as here, fixing the lay days commencing when the ship was "ready to discharge". In fact there is no provision in the charter party at all fixing the lay days, and all the case holds is that in the absence of the lay days, the charterer should be discharged in a reasonable time.

The words quoted by our opponent are from the lower court. On the appeal the House of Lords holds

that, under such a charter, the charterer may select a berth at which the ship must necessarily be delayed for a considerable time if that is *the general condition of the harbor.*

Carlton S. S. Co. v. Castle Mail Co., VIII Asp. 403.

As we have already shown, when Mr. Moore designated the Western Fuel Docks as the place of discharge, *all the bunkers at which coal is customarily discharged were three or four weeks behind time.*

In *Evans v. Blair,* also cited by our opponent, Judge Putnam uses the language below quoted which, taken in consideration with his opinion in *W. K. Niver Co. v. Cheronea S. S. Co.,* supra, shows that he contemplated delays at least of 35 days in length:

> "Charter parties and bills of lading which provided for loading or discharging an entire cargo at ports where there were several berths for loading or discharging, and which have been under discussion in the English courts, contained the expression, 'at any safe berth as ordered', or its equivalent. Murphy vs. Coffin, 12 Q. B. Div. 87; Copper Co. vs. Morel (1891), 2 Q. B. 647. The result of this class of cases, after some fluctuation, has been to leave the consignee a somewhat unlimited power in the matter of selecting the berth, regardless of its crowded state, provided, only, it is a safe one. This, however, comes from the fact that the charter party, or bill of lading, contained express language favorable to the consignee, and from the application of the well-known rule that where, in maritime contracts, *parties have seen fit to choose fixed forms of expression,* the great variety of contingencies incidental to maritime transactions *disenable the courts* from establishing any safe theory by which

> the letter can be *modified to meet any supposed intent.* Practically, therefore, this case comes down to the mere question whether or not the vessel was given her turn, subject to *whatever customs or necessities* existed at the *port of discharge* which might be fairly within the contemplation of both parties."
>
> *Evans v. Blair,* 114 Fed. 616, at 618, 619.

In the case at bar the charter uses a "fixed form of expression", i. e., "ready to discharge", which by the interpretation of the Circuit Courts of Appeals in this country and the King's Bench, Queen's Bench and Court of Appeal in Great Britain, means ready *in berth* to discharge.

In the case of *Williams v. Theobald,* 15 Fed. 465, there was no provision, as here, that the lay days were to begin after the vessel was ready to discharge, and hence the contention sustained in the later Circuit Court of Appeals cases were not considered by Judge Hoffman. The lay days not being expressly agreed to run *"after the vessel was ready to discharge",* the court construed the charter as making them run from the time of arrival in port, and not from the time of her arrival in her discharging berth. In that case it was not shown that there was any custom for the delivery of coal cargoes in rotation. Further, it was shown that the delay at the designated wharf was caused by the charterer's own coals, whereas it is shown in our case that but one of the dozens of vessels discharging at the three berths of the Western Fuel Company in the four months before the "Columbia's" discharge was chartered by J. J.

Moore & Company, and that one a steamer whose cargo was sold a year before arrival and which had arrived five days before the "Columbia". Certainly there is nothing here to upset the later holdings of the Circuit Court of Appeals, or even raise a question as to them.

As we read *Manson v. Ry. Co.,* 31 Fed. 297, there was no provision that the lay days were to commence when the vessel was "ready to discharge". With all the other cases cited by our opponent under Sec. III of his brief, it cannot be said that they contravene subsequent decisions of the Circuit Court of Appeals expressly dealing with the phrase in the charter party at bar.

D. *Charterer prevented performance by ship of her condition precedent of reaching the bunkers* (page 35 brief of appellant).

All the matter of this section has been treated by us under section III of this brief. It is well to note, however, that in so far as prevention of performance of a condition precedent is concerned, the burden of proof is on the libelant.

E. *If charterer has not made a proper designation, then vessel was an "arrived ship" on January 15th* (appellant's brief, p. 49).

In any event the lay days are not to begin to run in this case till "the ship is ready to discharge and *notice "thereof has been given by the captain in writing"* (Apostles, top of page 23).

The letter delivered on January 15th (Apostles, page 123) says nothing about readiness of the vessel to discharge. For all it contains, she might have been on fire, or without her crew, or with her winches broken, or in the hands of the U. S. Marshal. The contract calls for a *written notice* of readiness and none was given until the second letter (Apostles, page 124), mailed on January 18th, as registered matter and delivered probably on the 20th, as the 19th was Sunday. In no event can the lay days be said to commence before this, the 20th of January.

The balance of the contention of this section, i. e., that the designation of the bunkers of the Western Fuel Company was not definite enough and that we did not have them ready soon enough, we have already disposed of in sections II and III, supra.

F. *The custom of the port as to vessels taking their turn cannot vary the agreed number of lay days. The custom is not shown as a custom of the port. In any event the "Columbia" did not have her turn* (page 52, appellee's brief).

We agree that custom cannot increase or decrease the number of lay days, nor do we make any contention that the "Columbia" was entitled to more than fifteen lay days. The question is *when do the lay days begin to run* under a charter party providing that the vessel must first be "ready to discharge"? All the cases we have cited under section II hold that if the owner cannot reach his berth because a custom of the port giving vessels arriving first a prior right to go there, then the lay days do not *begin to run* till that time.

In *Davis v. Wallace,* Fed. Cases 3657, there was no provision in the charter that the lay days should begin when the vessel was "ready to discharge", and as a matter of fact the vessel was *at the wharf* before the delay arose. More important still, the charter there called for "quick dispatch", and all that is there said applies to such a charter party. We have already quoted portions of *U. S. v. J. J. Moore,* 196 U. S. 157, showing that case to be in accord with the principles laid down in section II of this brief.

Further, none of these cases of our opponent's consider the effect of the custom to compel vessels to await their turn under the clause of the charter excusing the charterer for delays from "hindrances beyond his control". All the cases under Section III of this brief agree that a delay from such a cause excuses the charterer, although the number of lay days are expressly fixed by the charter, or even where "customary dispatch" is agreed upon.

Larsen v. Sylvester (H. of Lords), XIII Com. Cases 328;

Leonis S. S. Co. v. Rank No. 2, XIII Com. Cases 295;

Schwaner v. Kerr, 170 Fed. 92;

Pyman S. S. Co. v. Mex. Central Ry. Co. (C. C. A.), 169 Fed. 281.

As to the custom not being shown as a custom *of the port,* we have already disposed of this by our excerpts from the Apostles, supra.

Smith, pages 95, 96;

Mills, pages 82, 83;

Mainland, 63.

It is suggested that there could be no custom because there had been no prior congestion of large dimensions. This is absurd as the custom is to control the ordinary conditions of the port. Do counsel contend that three vessels had never before arrived for the same berth at about the same time? If so there is occasion for a rule as to the order of their discharge. The testimony shows and the court must know from its reading of the cases alone, that the custom to "take turn" exists in practically every large port in the world.

As to the suggestion that the "Columbia" did not have her turn because, on Washington's birthday, a holiday, which under her charter was not a lay or loading day, the little schooner "Lunsmann" used one of the three spaces of the Western Fuel bunkers to discharge 300 tons of coal to lighten so she could enter Oakland creek, we say that this answers itself. At the most, if the "Columbia" had slipped in and out of the dock this *one* holiday, she would have reduced the delay one day.

But as the parties had agreed that holidays should be excepted, and as they are not "working days", even this one day should not be charged against the charterer.

To the suggestion that we were not entitled to a bunker with its modern appliances for removing a cargo, we have already pointed out the testimony of the "Columbia's" captain to the effect that it was customary to discharge at such bunkers (Apostles, page 31). The court would have taken judicial notice even in the absence of the captain's admission, that this was the practice of all modern commercial ports where grain or coal is handled in bulk.

G. *Cessor Clause* (p. 59, appellant's brief).

The appellee makes no claim that it is excused under the cessor clause.

H. *Lay days* (p. 59, appellant's brief).

We have already shown that no notice of readiness was mailed till January 18th, and that as it was registered, thus consuming time in the post office, and as the 19th was Sunday, it could not have been delivered till the 20th. The lay days, applying our opponent's theory

and accepting his testimony as to weather, are therefore, as follows:

January	21	Clear	1 day	
January	22	Clear	1 day	
January	23	Rain till noon	½ day	
January	24	Clear	1 day	
January	25	Afternoon clear	½ day	
January	26	Sunday		
January	27	Clear	1 day	
January	28	Clear	1 day	
January	29	Worked forenoon	½ day	
January	30	Clear	1 day	
January	31	Clear	1 day	
February	1	Rain		
February	2	Sunday		
February	3	Clear	1 day	
February	4	Worked afternoon	½ day	
February	5	Clear	1 day	
February	6	Clear	1 day	
February	7	Clear	1 day	
February	8	Clear	1 day	
February	9	Sunday		
February	10	Clear	1 day	15 days

This leaves eighteen demurrage days in February and nineteen and one-third to eleven o'clock of March 20th, in all thirty-seven and one-third days as a maximum, even if the vessel had been "ready *in dock* to discharge" when the registered mail letter dated January 18th, was delivered and even if the great financial depression of

1907, and the consequent coal congestion at San Francisco should be regarded as a hindrance *within* the control of the J. J. Moore Company.

In conclusion, we submit that the libelants have neither sustained their burden of proof that the "Columbia" was "ready to discharge" when the "notice of readiness" was served, nor that respondent prevented her from reaching a berth so she could claim she was ready. We further submit that whatever hindrance delayed the "Columbia's" discharge was a hindrance beyond respondent's control.

WILLIAM DENMAN,
Proctor for Appellee.